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No. 255

In the Supreme Court of the United States

OCTOBER TERM, 1968

JOHN JAMES BRENNAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, Jr.,
Assistant Attorney General,
BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals is reported at 394 F. 2d 151.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1968. On May 22, 1968, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to July 7, 1968, and on July 1, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

815-044—68

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1952, a statute designed to prohibit interstate travel in aid of gambling, covers petitioners' conduct aboard a vessel engaged in interstate commerce.

2. Whether the trial judge erred in finding that the gambling by petitioners aboard a ship was a business enterprise.

3. Whether petitioners' prosecution for the federal felony of interstate travel in aid of gambling was impermissible because a state prosecution for the gambling would have been for a misdemeanor.

STATUTE INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> * * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling * * * in violation of the laws

of the State in which they are committed or of the United States.

* * * * *

STATEMENT

After a non-jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on a five-count indictment which charged conspiracy and four substantive counts of travelling in interstate commerce in aid of gambling (18 U.S.C. 1952). On November 9, 1967, each was sentenced to six months' imprisonment on the conspiracy count, and to concurrent six months' imprisonment for each of the substantive offenses, with the sentence on the substantive counts (Counts 2 through 5) suspended for two years. The court of appeals affirmed.

The "City of Keansburg" was an excursion ship (R. 131) that operated between Atlantic Highland, New Jersey, and New York, New York. In July and August 1965, for a three-week period, many of its passengers to New York City on the evening run were persons returning from a New Jersey racetrack. Tables in a lounge area of the ship were used by petitioners for dice games which occurred aboard the ship four or five times per week during this period (R. 137). After the ship docked in New York petitioners would pay a crewman for setting up the tables (R. 135, 147, 720).

F.B.I. agents observed the games on four occasions. The games would be started by three of the petitioners positioning themselves around the table near the wall that the rolled dice were required to strike. They were

the only ones who could return the dice to the player (R. 57, 60, 64, 248, 389). The fourth petitioner, Fusco, then would initiate the game (R. 275, 276) and other passengers would join in (R. 55, 276). F.B.I. agents observed that all petitioners bet and, except when the game commenced, always bet that Fusco would win (R. 393).

Once an unidentified player, apparently a big winner, was seen giving a large amount of money to Fusco (R. 257). On other occasions the petitioners were seen dividing up money either aboard ship or afterwards in New York City (R. 582, 343).

The F.B.I. observed activities suggesting the "palming" of dice (R. 394–395, 422, 465). All petitioners were arrested while the August 5 game was in progress. Dello Russo and Brennan were found to have irregular dice in their possession (R. 479, 550).

ARGUMENT

1. Petitioners argue that their conduct is not covered by 18 U.S.C. 1952 because the gambling took place during the interstate travel and not after the conclusion of the trip (Pet. 10–12). However, as the court below held, petitioners traveled in interstate commerce as soon as the ship crossed from New Jersey to New York waters. When the dice game continued after this travel the "thereafter" provision of the statute was satisfied.

Moreover, the payment to the ship employee who arranged the tables and the distribution of money among petitioners was made after the ship docked. Thus, after the interstate travel, petitioners distrib-

uted the proceeds and performed acts to promote, manage, establish and carry on their unlawful gambling activity, as required by the part of the statute under which they were indicted.

2. Petitioners also argue that the dice games did not constitute a business enterprise as required by the statute (Pet. 13–14). The trial court, however, found that the operation of the dice games was a business enterprise conducted on a systematic basis (R. 806). This conclusion is fully supported by the evidence. After his arrest Dello Russo told an agent that, in view of the F.B.I. interest, he was going to have to find "another trade" (R. 504). Brennan asked that he be permitted to walk from the ship in such a way that "the suckers" could not see his face (505). Fusco had on his person a card from a concern selling dice equipment (R. 534). Such statements and the other evidence make clear that a business partnership intent on winning had been operating on the ship.

Petitioners' argument that their activity did not violate New York law (Pet. 14–16) falls with its premise that no commercial aspect was shown.

3. It is the province of Congress to determine the extent of permissible punishment for federal offenses. Congress had the right to regard use of interstate travel to further a gambling enterprise as a serious offense and to fix a uniform federal punishment notwithstanding the vagaries of state law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

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